

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**MOTION TO REQUIRE PROFFER REGARDING THE
SCOPE OF TESTIMONY OF DR. ROGER OLSEN**

Plaintiffs have disclosed their intention to call Dr. Roger Olsen to testify on Tuesday, November 17, 2009. Dr. Olsen has submitted an expert report in this matter comprising 170 pages of text and accompanied by hundreds of pages of voluminous tables, figures, and appendices. Defendants respectfully move that Dr. Olsen's testimony be precluded or limited to non-cumulative testimony.

Dr. Olsen's principal contribution to this case was his effort to develop a distinctive chemical "signature" for poultry litter. He also attempted to develop similar signatures for cattle manure and discharges from waste water treatment plants. Dr. Olsen endeavored to do so by means of a statistical method, Principal Component Analysis ("PCA"). The Court, however, found Dr. Olsen's work to be novel, untested, unpublished, and unreliable. Hrg. Tr. at 373:22-377:6 (July 29, 2009). Specifically, the Court found that Dr. Olsen repeatedly forced his same conclusions onto whatever the available data. *Id.* at 374:20-22.

Stripped of his PCA work, the balance of Dr. Olsen's report and potential testimony is cumulative of other witnesses or otherwise unnecessary and not probative. Dr. Olsen is

repeatedly explicit in his report that he merely summarizes and relies upon work performed by Plaintiffs' other experts. *See* Olsen Rpt. 6-2, 6-9, 6-10, 6-14, 6-23, 6-26, 6-28, 6-31. Plaintiffs presumably intend on calling these other experts to testify to their own work. Allowing Dr. Olsen to do so would unfairly and improperly afford Plaintiffs two bites at the apple, or prevent Defendants from cross-examining the persons actually responsible for the work.

Without his PCA, Dr. Olsen's "expertise" is otherwise limited to documenting the results of Plaintiffs' sampling and testing efforts, and concluding on that basis that various constituents associated with poultry litter are found in decreasing concentrations in various environmental components as water flows downhill from fields to Lake Tenkiller. This opinion is both cumulative and improper. Virtually all of this was already testified to by Dr. Fisher. Moreover, Dr. Olsen's previously disclosed "pathway" opinions, which he in large part attributes to Dr. Fisher¹ were presented as background and basis for his PCA, not as a separately source tracking methodology. In fact, in his report, Dr. Olsen does not tender any firm opinions or conclusions until after discussing his PCA, and it is clear that PCA is the principal underpinning for his opinions in this case.

Moreover, Dr. Olsen's proposed testimony is not probative of any remaining disputed issue in this case. Based on Plaintiffs' testing, Dr. Olsen purports to see decreasing concentrations of poultry-related constituents as water moves through downhill compartments. But each of those constituents has multiple sources in the environment, and Dr. Olsen cannot

¹ As Dr. Olsen writes in his report, "Dr. Bert Fisher has prepared an expert report evaluating the poultry wastes and delineating the pathways from the EOF to the final repository, Lake Tenkiller (Fisher 2008)." Olsen Rpt. § 6.8.3. Dr. Olsen repeats Dr. Fisher's opinion that "if sufficient rainfall occurs in a short enough period of time, runoff is produced (i.e. not all of the water can be taken up by the soil and it runs off the field)." *Id.* Dr. Olsen continues, "Dr. Fisher states (Fisher 2008) that surface water that does not runoff can travel with the water as it moves downward through the soil and vadose zone to pollute the groundwater." *Id.* Dr. Olsen's "pathway" analysis thus merely repeats Dr. Fisher's testimony that water runs downhill.

tease apart any specific amount of any of them contributed by poultry. The Court has already been treated to an extensive discussion of this generalized “population” approach during the testimony of Dr. Fisher. But Dr. Olsen, like Dr. Fisher, conducted no traditional fate and transport study of any of the constituents upon which he relies. In fact he candidly admitted in his deposition that in his view his PCA made any such inquiry unnecessary. Olsen 9-11-08 Depo. at 565:17-24.² He repeatedly cited his PCA as his justification for having failed to examine the vast majority of other sources of his constituents of interest in the IRW. Olsen 9-10-08 Depo. at 76:8-80:9 (relying on PCA as justification for failure to investigate streambank erosion); *id.* at 80:10-81:17 (same as to urban runoff); *id.* at 90:13-21 (same as to cattle impact on edge-of-field samples).

Dr. Olsen’s proposed testimony is thus cumulative and wasteful of trial time. It also lacks independent foundation, and is not probative of disputed issues. For these reasons Defendants respectfully move the Court to require Plaintiffs to make a proffer as to what new, admissible, and probative testimony Dr. Olsen will present, or otherwise restrict his testimony.

² **Q. Specifically how did you account for the differences in fate and transport via surface water pathways as compared, for instance, to groundwater pathways?**

A. I didn't have to in the principal component analysis. It gives me a chemical analysis at a particular spot, and if I still see the constituents and it has a particular score, then it's impacted.

Respectfully submitted,

BY: /s/ Thomas C. Green

Thomas C. Green
Mark D. Hopson
Jay T. Jorgensen
Gordon D. Todd
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
Tyson Foods, Inc.
Bryan Burns
Timothy T. Jones
2210 West Oaklawn Drive
Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

CERTIFICATE OF SERVICE

I certify that on the 16th Day of November, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us

Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
-------------------	--------------------

Louis W. Bullock	lbullock@bullock-blakemore.com
------------------	--------------------------------

Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com

Gordon D. Todd
Erik J. Ives
Sidley Austin LLP

gtodd@sidley.com
eives@sidley.com

Robert W. George

robert.george@tyson.com

Michael R. Bond
Erin Walker Thompson
Kutak Rock LLP

michael.bond@kutakrock.com
erin.thompson@kutakrock.com

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Paul E. Thompson, Jr.
Woody Bassett
Jennifer E. Lloyd
Bassett Law Firm

jgraves@bassettlawfirm.com
pthompson@bassettlawfirm.com
wbassett@bassettlawfirm.com
jlloyd@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
P. Joshua Wisley
Conner & Winters, P.C.

jelrod@cwlaw.com
vbronson@cwlaw.com
jwisley@cwlaw.com

Bruce W. Freeman
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

bfreeman@cwlaw.com

John H. Tucker
Leslie J. Southerland
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker & Gable

jtuckercourts@rhodesokla.com
ljsoutherlandcourts@rhodesokla.com
chtucker@rhodesokla.com
thillcourts@rhodesokla.com

Terry W. West
The West Law Firm

terry@thewesetlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann Kleibacker Lee
Todd P. Walker
Faegre & Benson LLP

dehrich@faegre.com
bjones@faegre.com
kklee@baegre.com
twalker@faegre.com

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves
D. Kenyon Williams, Jr.
COUNSEL FOR POULTRY GROWERS

mgraves@hallestill.com
kwilliams@hallestill.com

William B. Federman
Jennifer F. Sherrill
Federman & Sherwood

wfederman@aol.com
jfs@federmanlaw.com

Charles Moulton
Jim DePriest
Office of the Attorney General

charles.moulton@arkansag.gov
jim.depriest@arkansasag.gov

COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

griffithlawoffice@yahoo.com

Gary S. Chilton
Holladay, Chilton & Degiusti, PLLC

gchilton@hcdattorneys.com

Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon, LLP

vschwartz@shb.com
csilverman@shb.com

Robin S. Conrad

rconrad@uschamber.com

National Chamber Litigation Center, Inc.

**COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND
THE AMERICAN TORT REFORM ASSOCIATION**

Richard C. Ford
LeAnne Burnett
Crowe & Dunlevy

fordr@crowedunlevy.com
burnettl@crowedunlevy.com

COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins
McAfee & Taft

richard.mullins@mcafeetaft.com

James D. Bradbury
James D. Bradbury, PLLC

jim@bradburycounsel.com

**COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE
FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS
ASSOCIATION OF DAIRYMEN**

I also hereby certify that I served the attached documents by United States Postal Service,
proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
**COUNSEL FOR THE STATE OF
ARKANSAS AND THE ARKANSAS
NATURAL RESOURCES COMMISSION**

John E. and Virginia W. Adair Family Trust
Route 2 Box 1160
Stilwell, OK 74960

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Cary Silverman
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

Cherrie House
P.O. Box 1097
Stilwell, OK 74960

David Gregory Brown
Lathrop & Gage LC (Jefferson City)
314 E High Street
Jefferson City, MO 65101

Donna S Parker
34996 S 502 Road
Park Hill, OK 74451

Doris Mares
14943 SE 15th Street
Choctaw, OK 73020-7007

G Craig Heffington
20144 W Sixshooter Road
Cookson, OK 74427

George R Stubblefield
HC-66, Box 19-12
Proctor, OK 74457

Gordon W. and Susann Clinton
23605 S Goodnight Lane
Welling, OK 74471

Jerry M Maddux
Selby Connor Maddux Janer
P.O. Box Z
Bartlesville, OK 74005-5025

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Jonathan D Orent
Motley Rice LLC (Providence)
321 S Main Street
Providence, RI 02940

Marjorie Garman
19031 US HWY 412
Colcord, OK 74338-3861

Randall E Kahnke
Faegre & Benson (Minneapolis)
90 S 7th Street, Suite 2200
Minneapolis, MN 55402-3901

Richard E Parker
34996 S 502 Road
Park Hill, OK 74451

Robin L. Wofford
Route 2, Box 370
Watts, OK 74964

Steven B Randall
58185 County Road 658
Kansas, OK 74347

Victor E Schwartz
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

William House
P.O. Box 1097
Stilwell, OK 74960

/s/ Jay T. Jorgensen